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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,

Plaintiff and Appellant,

v.

ENRIQUE PATLAN et al.,

Defendants and Respondents.

E069793

(Super.Ct.No. CIVDS1601268)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Reversed with directions.

Xavier Becerra, Attorney General, Satoshi Yanai and Cherokee DM Melton, Deputy Attorneys General, for Plaintiff and Appellant.

Chandler Law Firm, Robert C. Chandler and Carla R. Kralovic, for Defendants and Respondents.

On two occasions, defendant and respondent Enrique Patlan refused to rent an apartment to real party in interest Carla Sullivan because she has a dog.[1] Plaintiff and appellant Department of Fair Employment and Housing (DFEH) filed a complaint alleging disability discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code,[2] § 12900 et seq.) and the Unruh Civil Rights Act (Civ. Code, § 51) because Sullivan is a person with a disability, her dog is a support animal, and Patlan refused to waive his no-pets policy as a reasonable accommodation for her disability. Real party in interest Inland Fair Housing and Mediation Board (IFHMB) assisted Sullivan in pursuing her claim and devoted resources to addressing Patlan's alleged conduct.

After a bench trial, the trial court entered judgment in favor of the Patlans, reasoning that a psychologist who formally diagnosed Sullivan with a mental illness and wrote a "letter of support and approval" for Sullivan to "have access to a therapeutic animal at all times" did so only after Sullivan's two attempts to rent from Patlan. The trial court remarked that "if at the time of the encounters, Sullivan was armed with the diagnosis from [the psychologist] of her condition and [the dog] had been designated as an emotional support animal by [the psychologist], the defendants would have been in

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[1] Defendant and respondent Martha Patlan is Enrique Patlan's wife, and they are co-owners of the property where Sullivan tried to rent an apartment. There is no indication, however, that Martha Patlan had any direct dealings with Sullivan, and it is Enrique Patlan's actions that are the focus of this lawsuit. In this opinion we therefore will generally use "Patlan" to refer to Enrique Patlan, and "the Patlans" or "respondents" when referring collectively to both Enrique and Martha Patlan.

[2] Further undesignated statutory references are to the Government Code.

violation of law as alleged in the complaint and subject to damages as alleged and proven at trial."

The trial court's reasoning—that Sullivan must have been "armed" with a formal diagnosis of her mental illness and designation of her dog as a support animal at the time of her attempts to rent from Patlan for DFEH to prevail on its claims—is erroneous. We reverse the judgment and remand the matter with instructions to enter a new judgment in favor of DFEH and real parties in interest.

I. BACKGROUND

In February 2016, DFEH filed its complaint in this action. The complaint asserts four causes of action: (1) disability discrimination in violation of FEHA based on refusal to rent; (2) disability discrimination in violation of FEHA based on failure to engage in the interactive process; (3) disability discrimination in violation of FEHA based on unlawful statements of preference; and (4) denial of civil rights in violation of FEHA and the Unruh Civil Rights Act. The complaint seeks damages and injunctive relief on behalf of Sullivan and IFHMB, and an award of DFEH's attorney fees and costs.

At trial, DFEH presented evidence—specifically, testimony from Sullivan and video-recorded deposition testimony from her psychologist, Dr. Mindy Mueller, who was unavailable to testify in person at trial—that Sullivan has been disabled since 2000 or 2001. Sullivan has limited use of her right arm. She has also been diagnosed "several times," by different doctors, with posttraumatic stress disorder (PTSD) and depression. In addition to taking medication, Sullivan has relied on her dog to help manage her

conditions, which cause symptoms, including nightmares, panic attacks, and anxiety, and which impair her ability to function in daily life, sometimes severely. Sullivan has had the dog since 2008.

Sullivan testified at trial that in July 2014 she called a telephone number on a "For Rent" sign to inquire about an apartment in Big Bear, California.[3] She reached the owner, Patlan. During their discussion, Sullivan told Patlan that her income included Social Security disability payments that she received due to an injury she developed when she previously worked as a police officer. Sullivan asked about Patlan's policy on dogs; he told her that he had a no-pets policy. Sullivan responded that her dog was not a pet, but rather a "service dog" that she has for her disability.[4] Patlan said "absolutely no," elaborating that he had previously been sued when a tenant's dog bit someone. Sullivan tried to explain that "you can't not rent to me because I have a service dog." Patlan "said he was the owner" and "he could rent to anybody he wanted to" before hanging up on Sullivan.

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[3] The property where Sullivan tried to rent has four freestanding rental units. The parties have referred to the unit Sullivan tried to rent as both a house and an apartment. To avoid confusion, we use the term apartment in this opinion.

[4] The terms "service dog" and "support dog" are not synonymous, even though the parties and the trial court sometimes used them interchangeably. (Compare Civ. Code, § 54.1, subd. (b)(6)(C)(iii) [defining "service dog"] with Cal. Code Regs., tit. 2, § 11065, subd. (a)(1)(D) [defining "support dog"].) DFEH does not allege in this lawsuit that Sullivan's dog is a service dog in the strictest sense of the term, only that he is a support dog.

Sullivan further testified that in August 2014, she responded to an advertisement that had been posted in a local grocery store for the same apartment.[5] She arranged to meet Patlan at the property for a tour. Once inside, after some discussion of the apartment's amenities, Sullivan asked Patlan about his policy on dogs. He responded, "'No pets, absolutely no.'" Sullivan tried to explain that she was "legally disabled," and that she has a "service dog" who helps her with her disability. Patlan accused her of trying to "scam" him. Sullivan asked if she could still have a rental application. Patlan agreed to give her the application, but stated that he was not going to rent to her. After Patlan "ushered" Sullivan out of the apartment, he retrieved the application from his truck and tossed it at her, rather than handing it to her. When Sullivan retrieved the application from the ground, she noticed that Patlan had crossed out the printed amount of $30 for the credit check fee—the amount he had verbally quoted to her—and written in $50. In a space for "PROPOSED PETS," he had written in "NO PETS." According to Sullivan, Patlan then "flipped [her] off" as he drove away. Sullivan never filled out the application; Patlan drove away before she had an opportunity to do so, there was no contact information on the application, and he had stated the application would be denied in any case.

Patlan testified at trial. He stated that Sullivan "never mentioned anything like" an accommodation for her animal, and that he did not recall her telling him that she had a

[5] In its complaint, DFEH alleged that Sullivan was not initially aware that the advertisement was for the same apartment she had discussed with Patlan. This allegation was not addressed at trial.

"medical problem." When they met at the property in August 2014, he recalled Sullivan from their July 2014 telephone conversation as "a lady with a companion dog." He testified that he gave the rental application to Sullivan before they toured the apartment, not after, and denied that he made any rude gestures to her as he drove away.

Patlan's trial testimony, however, was in some tension with his deposition testimony, portions of which were introduced at trial for impeachment purposes. In his deposition, Patlan had stated as follows: "'[S]he didn't say "I have a disability," or nothing like that. She said that [her dog] was a companion and she had this stress and to her, it was a companion dog and she never told me she had a disability. . . . she said she had the dog for companion because she used to be a police officer and she was very stressed.'" Patlan denied that Sullivan had used the term "'posttraumatic stress disorder,'" but stated that "'she told me she had the dog for stress companion.'" In his deposition testimony, Patlan admitted that he had been irritated with Sullivan and "'gave her the finger'" as he "'took off.'"

Sullivan first met with Mueller, the psychologist, in July 2014. Based on that first session and a review of Sullivan's medical records, Mueller came to a provisional diagnosis of PTSD and major depressive disorder. At their next session, in August 2014—after Sullivan's encounter with Patlan that month—Mueller formally diagnosed Sullivan with PTSD and major depressive disorder based on her assessment of Sullivan's behavior during their sessions, Sullivan's self-reported symptoms, and previous diagnoses for those conditions reflected in Sullivan's medical records. On the date of the

second session, Mueller also gave Sullivan a "letter of support and approval for [her] to have access to a therapeutic animal at all times" because she meets "the criteria for a disability and mental health condition." Mueller testified in her deposition that she had personally witnessed how the dog's presence ameliorated Sullivan's symptoms.

At trial, the chief executive officer of IFHMB testified. He described the organization as a "HUD-approved housing counseling agency" that does "fair housing education, outreach and enforcement activities." Sullivan reported Patlan's behavior to IFHMB. IFHMB investigated, including by conducting a "telephone test," that is, by having someone with a profile that "mirrors . . . the person who is alleging the discrimination" contact Patlan and inquire about renting, and comparing the response with a control tester "who is not a member of that protected class." The results of the telephone test "seemed to corroborate what . . . Sullivan had alleged happened to her." IFHMB therefore assisted Sullivan with filing a housing discrimination complaint with the United States Department of Housing and Urban Development. It also devoted resources to "counteract the discrimination that has occurred" and to "prevent it from happening again," including by engaging in community outreach and education efforts in the area, and by follow-up testing at Patlan's properties.

In September 2017, the trial court issued a statement of decision finding that Patlan had been "less than civil to Sullivan," including by making a rude gesture towards her at the conclusion of their "in person encounter." The court also found that "[t]here was some discussion during these encounters that Sullivan suffered from PTSD and that

she had a dog that was an emotional support animal." The court found, however, that Sullivan was "actually diagnosed with PTSD and her dog . . . was designated as a support animal" only "sometime after" her two "encounters" with Patlan. On that basis, the court ruled that judgment should be in favor of the Patlans, but commented that "there is no dispute that, if at the time of the encounters, Sullivan was armed with the diagnosis from Dr. Mueller of her condition and [her dog] had been designated as an emotional support animal by Dr. Mueller, the defendants would have been in violation of [the] law as alleged in the complaint and subject to damages as alleged and proven at trial."

II. DISCUSSION

When presented with a claim that an accommodation is necessary for a renter's disability, a landlord must, at a minimum, open a dialogue rather than reject the request out-of-hand. Here, under the facts found by the trial court, Patlan failed to meet this requirement. For that reason, we reverse and remand with instructions that judgment instead be entered in favor of DFEH, Sullivan, and IFHMB.

A. *Applicable Law*

Unlawful housing discrimination under FEHA includes the "refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." (§ 12927, subd. (c)(1).) "[T]o establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or

should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1592 (*Auburn Woods*).)

The inquiry into whether a particular accommodation is reasonable is "fact specific and requires a case-by-case determination." (*Auburn Woods, supra*, 121 Cal.App.4th at p. 1593.) Nevertheless, it is well established that waiver of a no-pets policy to allow use of a support animal in a tenant's home may, "under the right circumstances," constitute a reasonable accommodation to the tenant's disability. (*Ibid*.) "'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.'" (*Id.* at p. 1598, quoting *Jankowski Lee & Associates v. Cisneros* (7th Cir. 1996) 91 F.3d 891, 895.)

"In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) Generally, "[w]e apply a substantial evidence standard of review to the trial court's findings of fact." (*Ibid.*) But when a party challenges on appeal a ruling that it failed to carry a burden of proof, the substantial evidence standard is inappropriate, and "'the question . . . becomes whether the evidence compels a finding in favor of the appellant as a matter of law.'" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465-466.) Specifically, the question becomes whether

the appellant's evidence was (1) """uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.""" (*Ibid*.)

B. *Analysis*

The trial court gave dispositive weight to the circumstance that Sullivan was not "armed" with a formal diagnosis from her current psychologist and a letter "designat[ing]" her dog to be an emotional support animal when she had her "encounters" with Patlan. This ruling was erroneous. As a matter of law, Sullivan was not required to have in hand a formal diagnosis of her disability or letter designating her dog to be an emotional support animal to fall within FEHA's protections. The judgment therefore must be reversed.

Under FEHA, the term "mental disability" is defined to include "[h]aving any mental or psychological disorder or condition . . . that limits a major life activity," with specific exceptions not relevant here. (§ 12926, subd. (j)(1), (5).) "A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult." (*Id.*, subd. (j)(1)(B).) The term "'Major life activities'" is "broadly construed and shall include physical, mental, and social activities and working." (*Id.*, subd. (j)(1)(C).) It is well established that both depression and PTSD can fall within the FEHA definition of mental disability. (See *Auburn Woods, supra,* 121 Cal.App.4th at pp. 1592-1593 [discussing depression]; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 258-259 [discussing PTSD].)

Sullivan carried her burden of proof on the issue of whether she was disabled with her own uncontradicted and unimpeached testimony that she had suffered from depression and PTSD since 2000 or 2001, and that these conditions impaired her ability to function in daily life, sometimes severely. Mueller formally diagnosed Sullivan with major depressive disorder and PTSD on August 26, 2014, after Sullivan's encounters with Patlan, but there is no question that Sullivan had already suffered from those disorders for years. Mueller's formal diagnosis was based in part on Sullivan's medical records, reflecting earlier diagnoses by previous caregivers. Moreover, in posttrial briefing in the trial court, Patlan explicitly conceded that Sullivan "suffered from a disability at the time of the incident[s]." The evidence therefore left "no room" for a judicial determination that Sullivan did not suffer from a disability when Patlan refused to rent to her. (See *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.*, *supra*, 196 Cal.App.4th at pp. 465-466.) The trial court's focus on when Sullivan was "actually diagnosed" by her current psychologist was erroneous.

The trial court's reasoning regarding when Sullivan's dog became a support dog rests on a similarly mistaken focus on documents from Mueller. A "support dog" (or other animal) is one "that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities." (Cal. Code Regs., tit. 2, § 11065, subd. (a)(1)(D).) A support dog does not require any particular training or special skills to serve its purpose; it is "the innate qualities of a dog, in particular a dog's friendliness and ability to interact with humans,"

that allow it to provide therapeutic support. (*Auburn Woods*, *supra*, 121 Cal.App.4th at p. 1596.) Sullivan's uncontradicted and unimpeached trial testimony, supported by Mueller's deposition testimony, established that the dog had provided Sullivan with "emotional, cognitive, or other similar support" for years. (See Cal. Code Regs., tit. 2, § 11065, subd. (a)(1)(D).) Mueller's letter did not "designate" Sullivan's dog as a support dog, as the trial court put it, but rather was an endorsement that Sullivan *continue* to have access to such support at all times.

The discussion of similar issues in *Auburn Woods*, *supra*, 121 Cal.App.4th 1578—a case both parties cite in their briefing—is instructive. In *Auburn Woods*, the real parties in interest were a husband and wife who lived in a condominium in a development where dogs were not allowed. (*Id.* at p. 1584) They nonetheless got a dog in the hopes that it would help with the severe depression that they both suffered. (*Ibid.*) They found that the dog did in fact have a positive effect, alleviating symptoms for both of them. (*Ibid.*) Only later, after the property manager demanded that they remove the dog or face fines for violating the development's covenants, conditions, and restrictions, did the couple seek and obtain letters from a doctor supporting a waiver of the prohibition against dogs as a reasonable accommodation for their disabilities. (*Id.* at p. 1585.) Their request for a waiver of the no-dogs policy was denied. (*Id.* at p. 1588.) The Court of Appeal found substantial evidence supported an agency determination that the development had violated FEHA by failing to allow the couple to keep a dog as a reasonable accommodation to their disabilities. (*Id.* at p. 1599.) In so ruling, the Court of Appeal

gave no weight to the circumstance that the couple obtained the dog before requesting an accommodation or getting a letter from their doctor supporting their getting a dog to help alleviate their symptoms. Here, similarly, it is irrelevant that Mueller's formal diagnosis of Sullivan and her letter supporting Sullivan's use of a support animal date to after Sullivan's encounters with Patlan.

Respondents have not attempted to defend the trial court's reasoning regarding the timing of Mueller's formal diagnosis and letter. Instead, they focus on the second element of a FEHA discrimination claim whether "the discriminating party knew of, or should have known of, the disability." (*Auburn Woods, supra,* 121 Cal.App.4th at p. 1592.) Their arguments, however, are without merit.

Respondents assert that Sullivan never told Patlan that she had an "emotional disability"; she instead emphasized to Patlan that she had injured her arm as a police officer. Respondents also make much of Sullivan's testimony that she told Patlan that she had a "service dog," when in fact her dog is a support dog. The trial court found, however, that "[t]here was some discussion" between Patlan and Sullivan that "Sullivan suffered from PTSD and that she had a dog that was an emotional support animal." This finding of fact is supported by substantial evidence, specifically, Patlan's deposition testimony that Sullivan had told him "she had the dog for stress companion," and Sullivan's own testimony that she repeatedly told Patlan that she was disabled, and the dog helped her with her disability.

Respondents assert, in essence, that it was reasonable for Patlan to believe he was being "scam[med]" because he "could not identify based on his observations of Sullivan" and the limited information she had provided regarding her disability why she might need a "service dog." Again, *Auburn Woods*, *supra*, 121 Cal.App.4th 1578, is instructive: if a landlord is skeptical of a prospective tenant's alleged disability or requested accommodation, "'it is incumbent upon the landlord to request documentation or open a dialogue.'" (*Id.* at p. 1598.) The landlord may not "simply sit back and deny a request for reasonable accommodation because it did not think sufficient information had been presented or because it did not think [the tenant] had spoken the 'magic words' required to claim the protections of FEHA." (*Ibid.*) Applying these principles, the undisputed facts in the record demonstrate that Sullivan informed Patlan that she had a disability, that her dog helped her with her disability, and that she would therefore like a waiver of the no-pets policy as a reasonable accommodation for her disability. If Patlan felt he needed more information to understand Sullivan's disability and why waiver of his no-pets policy might be a reasonable accommodation of that disability, he was required to request documentation and open a dialogue, not simply "present an inflexible response: no dogs." (*Id.* at p. 1599.)

The trial court expressly indicated in its statement of decision that, if not for the issue of when Mueller formally diagnosed Sullivan and wrote a letter supporting her use of a support animal, the Patlans "would have been in violation of [the] law as alleged in the complaint and subject to damages as alleged and proven at trial." As discussed

above, the trial court was mistaken to believe that issue to be dispositive. The matter therefore is properly remanded to enter a new judgment reflecting that the Patlans were in fact in violation of the law as alleged in the complaint, and making an award of damages and any other remedies as alleged and proven at trial.

III. DISPOSITION

The judgment is reversed. The matter is remanded with instructions to conduct further proceedings as necessary to determine an appropriate award of damages and any other remedies, and to enter a new judgment in favor of DFEH, Sullivan, and IFHMB. DFEH is awarded its costs on appeal.

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RAPHAEL
J.

We concur:

RAMIREZ
P. J.

MILLER
J.